

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Improving Public Safety Communications in the)	WT Docket No. 02-55
800 MHz Band)	
)	
Consolidating the 800 and 900 MHz)	
Industrial/Land Transportation and Business Pool)	
Channels)	
)	
Amendment of Part 2 of the Commission's Rules)	ET Docket No. 00-258
To Allocate Spectrum Below 3 GHz for Mobile)	
and Fixed Services to Support the Introduction of)	
New Advanced Wireless Services, Including Third)	
Generation Wireless Systems)	
)	
Petition for Rule Making of the Wireless)	RM-9498
Information Networks Forum Concerning the)	
Unlicensed Personal Communications Service)	
)	
Petition to Rule Making of UT Starcom, Inc.,)	RM-10024
Concerning the Unlicensed Personal)	
Communications Service)	
)	
Amendment of Section 2.106 of the Commission's)	ET Docket No. 95-18
Rules to Allocate Spectrum at 2 GHz for use by)	
the Mobile Satellite Service)	

To: The Commission

PETITION FOR RECONSIDERATION

AIRPEAK Communications, LLC ("AIRPEAK" or "Company"), by its attorneys and in accordance with Section 1.429 of the Federal Communications Commission ("FCC" or "Commission") rules and regulations, respectfully requests limited

reconsideration of the FCC decision in the above-entitled proceeding.¹ The Supplemental Order includes certain substantive modifications of the rules adopted previously in this proceeding governing the relocation of non-Nextel/Southern LINC EA licensees and, in particular, ESMR licensees.² AIRPEAK respectfully requests the FCC to reconsider its modified requirements to the extent that the revised rules: 1) define as eligible for relocation only those cell sites that have a 40 dBu/V contour overlap with another cell site in the network³ and 2) limit site-based stations that qualify for relocation to their 40 dBu/V coverage contour.

Both provisions are substantively different than the rules adopted in the original 800 MHz Order. Further, they were adopted a month after the FCC's deadline for identifying site-based stations that qualify for relocation. At least as to the first provision, the FCC's revised standard deprived AIRPEAK of the opportunity to modify its deployment schedule to satisfy the new FCC requirements. As described below, neither provision is necessary to achieve the FCC's objectives in this proceeding or to promote the public interest.

I. INTRODUCTION

The Commission has correctly identified AIRPEAK as the operator of an ESMR network.⁴ The Company acquired a number of EA authorizations at FCC auctions with the express intention of deploying a cellular architecture system in those markets. It purchased and began deployment of its Harmony network well before

¹ WT Docket No. 02-55, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004) ("Supplemental Order").

² WT Docket No. 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order and Order*, 19 FCC Rcd 14969 (2004) ("800 MHz Order").

³ Supplemental Order at para. 78.

⁴ 800 MHz Order at ¶ 159; Supplemental Order at ¶ 75.

initiation of this proceeding. The Harmony system uses an iDEN-derivative technology and provides integrated two-way dispatch, cellular telephone and alphanumeric messaging. The Company took delivery of its initial Harmony Mobile Switching Office (“MSO”), Enhanced Base Transceiver Systems (“EBTS”) to be used at the cell sites, and subscriber units in 2000 and since then has expanded its operation to markets in several states. It currently operates in several smaller markets such as Reno, NV; Pasco/Kennewick, WA; and Albuquerque, NM.

The Company is one of fewer than five non-Nextel entities operating cellular architecture systems in the 800 MHz band.⁵ Given the very small number of non-Nextel/Southern LINC licensees claiming ESMR status, AIRPEAK believes it may be the only entity affected by the revised rules governing relocation of site-based stations. For this reason, the Company also is filing a waiver request consistent with the recommendations herein, in which it seeks relief specific to its particular situation. Should the Commission grant AIRPEAK’s waiver request, the Company would withdraw the instant Petition for Reconsideration.

II. BACKGROUND

The 800 MHz Order established rules regarding the relocation of non-Nextel/Southern LINC ESMR operations in the 800 MHz band. That Order specifically identified AIRPEAK as one of the “CMRS licensees other than Nextel using iDEN or iDEN-like ESMR technology in the 800 MHz band.”⁶ It confirmed that

⁵ See Regional Prioritization Plan of the 800 MHz Transition Administrator (“TA”) filed on January 31, 2005, at pp. 10-13. AIRPEAK recently filed its 800 MHz ESMR Election with the TA in which it elected to relocate its EA authorizations and identified site-based licenses to the ESMR portion of the 800 MHz band. See 800 MHz ESMR Election filed by AIRPEAK on January 24, 2005.

⁶ 800 MHz Order at ¶ 159.

such entities would have three relocation options, including the option of relocating to the ESMR Band where they would share spectrum with Nextel.⁷ The 800 MHz Order also recognized that Nextel and other ESMR operators used a combination of EA geographic and site-specific licenses in their networks. The Commission concluded that the following rules would apply to non-Nextel/Southern LINC ESMR site-based licenses:

...we will give these [ESMR] licensees the option to relocate their site-based licenses along with their EA-licenses to the ESMR portion of the band. In order to transfer a site-based channel into the ESMR segment, a licensee must: (a) currently hold an EA license in the relevant market; and (b) be using the site-based license as part of a cellular-architecture system in that market as of the date of publication of this *Report and Order* in the Federal Register. Further, to create a more uniform licensing scheme, the transferred site-based license will be converted to an EA-wide, incumbent-free license in the ESMR portion of the band.⁸

On December 22, 2004, the FCC released the Supplemental Order in which it made certain revisions to the ESMR election process *vis-à-vis* site-based stations that it described as a slight modification.⁹ The Supplemental Order included three distinct changes.¹⁰ First, although the FCC stated that it was reiterating the test for determining whether a site-based license could be relocated to the ESMR Band, it actually added a third condition. In addition to requiring that the licensee (a) currently hold an EA license in the relevant market; and (b) be using the site-based license as part of a cellular-architecture system in the market as of the date of publication of the 800 MHz Order in the Federal Register, the Supplemental Order

⁷ *Id.* at ¶ 162.

⁸ *Id.* at ¶ 163.

⁹ Supplemental Order at ¶ 78.

¹⁰ The Supplemental Order does not explain the genesis of any of these changes or why the FCC believes they are appropriate. Nonetheless, the modifications presumably are a *sua sponte* result of the Commission's further, internal deliberations. There are no *ex parte* filings in the record since adoption of the 800 MHz Order that suggest such changes are appropriate or even address these specific matters.

added, without explanation, that the station “...(c) must have been an operational part of the licensee’s ESMR system, within the relevant EA.”¹¹

Second, the FCC went on to expand that condition with the following definition:

- The site-based cell must have been an integral part of the EA licensee's ESMR system as of the date the *800 MHz R&O* was published in the Federal Register. A cell that is an integral part of a ESMR system is a cell that has a 40 dBu/V coverage contour overlapping the 40 dBu/V coverage contour of another cell integral to the ESMR system, and must be capable of "hand-off" of calls to and from the cell its 40 dBu/V coverage contour overlaps.¹²

Third, in a fundamental change from the 800 MHz Order, the FCC determined that site-based licenses would not be exchanged for EA-wide, incumbent-free authorizations and instead substituted the following provision:

- Such a site-based cell may be moved into the ESMR spectrum, but is limited to the 40 dBu/V coverage contour it provided as of the date the *800 MHz R&O* was published in the Federal Register.¹³

III. ALL SITE-BASED LICENSES INTEGRATED INTO AN ESMR NETWORK SHOULD BE ELIGIBLE FOR RELOCATION TO THE CMRS BAND.

The original rules defining site-based stations eligible for relocation to the ESMR band, and the only rules that were applicable at the November 22, 2004 deadline for qualification, stated that the EA licensee must “be using the site-based license as part of a cellular-architecture system in the market”¹⁴ in which the licensee also held an EA authorization. It was one month **after** that cut-off date that the

¹¹ Supplemental Order at ¶ 78.

¹² *Id.* It is unclear whether the terms “operational” and “integral” in these two provisions are considered interchangeable in this context, but AIRPEAK assumes that to be the FCC’s intention.

¹³ *Id.*

¹⁴ See n. 8 *supra*.

Commission in the Supplemental Order added the condition that the site-based cell site must have an overlapping 40 dBu/V contour with another cell site in the network.

The Supplemental Order offers no explanation for this new condition. It is not clear why the Commission has determined to consider hand-off on a site-by-site basis rather than as a capability of the network itself. The FCC considers all cellular and PCS sites as integral parts of cellular architecture networks without examining whether a particular site has a contour overlap with another site in the network. It presumably accepts the “stand-alone” sites operated by Nextel and its affiliate to be part of the iDEN network since the network itself and every site integrated into it is capable of hand-off even if that function is not yet an operational requirement for a particular location. There is no obvious basis for using a different standard in this instance.

AIRPEAK operates in primarily rural markets. Guided by the only definition available to it prior to the FCC’s November 22, 2004 deadline for identifying site-based stations eligible for relocation to the ESMR band, the Company assumed that all cell sites integrated into the AIRPEAK network switch and able to carry communications between subscribers throughout the network would qualify for relocation. The Company considers such stations “integral” to its network even if they do not yet have contour overlap with other cell sites in the system. In fact, it is not uncommon in the initial stages of any CMRS rural market build-out for certain locations not to have overlapping coverage with other sites. The Commission’s newly-adopted definition would substitute the agency’s judgment for that of the operator in determining where and when facilities should be deployed with no apparent countervailing public benefit.

The most troubling part of the FCC's new requirement is its timing. This defining criterion was not adopted until after the November 22, 2004 deadline by which site-based stations needed to qualify for ESMR relocation. AIRPEAK could have, and most certainly would have, constructed additional sites with overlapping contours pursuant to its EA authorizations if this condition had been announced as part of the 800 MHz Order. It would have done so even if its immediate coverage and subscriber requirements did not demand a second, proximate site for the sole purpose of ensuring that all its site-based stations qualified for relocation to the ESMR band. It was not afforded that opportunity because the definition was not made part of the ESMR relocation standard until after the deadline had passed. For that reason alone, the FCC's revised rule should be vacated.

IV. THE FCC SHOULD MODIFY ITS RULE GOVERNING THE BASIS ON WHICH A QUALIFIED SITE-BASED STATION IS RELOCATED TO THE ESMR BAND.

The 800 MHz Order stated that qualified site-based licenses would be “converted to an EA-wide, incumbent-free license in the ESMR portion of the band.”¹⁵ By contrast, and without explanation, the Supplemental Order determined that such a station could be relocated to the ESMR band but would be “limited to the 40 dBu/V contour it provided as of the date of the 800 MHz R&O was published in the Federal Register.”¹⁶

As an initial matter, AIRPEAK assumes that the FCC does not intend by this modification to curtail the rights site-based licensees currently enjoy. FCC Rule Section 90.693 allows licensees of site-specific 800 MHz SMR stations to modify or add

¹⁵ *Id.*

¹⁶ Supplemental Order at ¶ 78.

sites anywhere within their 22 dBu/V contour, provided they do not expand that contour and also satisfy the co-channel separation requirements in FCC Rule Section 90.621(b) *vis-à-vis* other site-based stations. If site-specific stations are moved into the ESMR band based only on their contours, at a minimum they should retain all rights currently available under Section 90.693.

Further, AIRPEAK recommends that the FCC adopt a modified position in respect to site-based/EA relocation rights. In the 800 MHz Order, the Commission concluded that qualified site-based licenses would be exchanged for unencumbered EA-wide authorizations. The rationale for that approach was the FCC's assessment that it would create a more uniform licensing scheme.¹⁷ The Supplemental Order offers no explanation for rejecting that conclusion. It simply states that site-based licenses instead will be relocated on a contour basis.

AIRPEAK presumes the change was premised on a Commission concern that a site-based license located at the outer boundary of an EA with only nominal coverage within the market would receive an unwarranted benefit if exchanged for an unencumbered EA-wide authorization. The Company instead suggests a middle ground that it believes is consistent with the FCC's original reasoning, but would not bestow any unjust advantage.

AIRPEAK recommends that if the 22 dBu/V contour of a site-based station provides coverage to at least fifty percent (50%) of the population within the EA, the station should be relocated to the ESMR band on an EA-wide basis.¹⁸ The FCC

¹⁷ 800 MHz Order at ¶ 163.

¹⁸ If there are multiple stations using the same frequency(s) the analysis should be performed on a composite contour basis consistent with current FCC practice.

routinely considers one-third population coverage as a first benchmark for demonstrating satisfactory spectrum utilization throughout a geographic area and two-thirds coverage as conclusive evidence that the spectrum is being used productively.¹⁹ A station that already has reached a fifty percent (50%) penetration level likely has captured the major population areas within the market. The remaining population typically will be dispersed broadly throughout the rest of the EA. Under these circumstances, it would be both equitable and simpler from an administrative perspective to exchange the site-based stations for an unencumbered EA-wide authorization.

V. CONCLUSION

For the reasons described herein, AIRPEAK requests the FCC to modify its rules governing the relocation of non-Nextel/Southern LINC site-based licenses to the ESMR band consistent with the recommendations detailed herein.

Respectfully submitted,

/s/

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¹⁹ See e.g., 47 C.F.R. 90.685(b).